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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 794

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Denver and Rio Grande Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 21, 1966.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pages 77-82 of the record. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 21, 1966, and is appended hereto as Appendix A. The petition of the Denver and Rio Grande Western Railroad Company for rehearing was denied on October 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In an action to recover damages for an unlawful strike, is venue proper as to the defendant labor union, an unincorporated association, in the judicial district where the defendant labor union is doing business and in which the unlawful strike occurred; or can the action be brought only in another judicial district, some thirteen hundred miles away, merely because the defendant labor union maintains its principal office in the latter judicial district?

2. Was the decision of this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965) on a question of diversity jurisdiction intended, as the Court below concluded, to overrule the Second Circuit's decision in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), cert. denied 372 U.S. 974, and other federal decisions holding that an unincorporated association is a resident for venue purposes of the judicial districts in which it is doing business?

3. Was it consistent or permissible for the Court below, having purportedly ruled on the basis of *Steelworkers* v. *Bouligny*, 382 U.S. 145 (1965), to conclude that venue can and must be laid at the unincorporated association's principal place of business, i.e., Cleveland, Ohio?

4. Where the General Chairman of a defendant labor union participates in the authorization, institution and conduct of an unlawful strike, may the Court of Appeals

set aside the judgment of the District Court holding the General Chairman responsible, along with the union, for the damages accruing from such a strike?

STATUTE INVOLVED

The statutory provisions involved are § 1391 of Title 28, United States Code and Rule 52(a) of the Federal Rules of Civil Procedure. They are printed in Appendix B hereto.

STATEMENT

This action was brought by the Denver and Rio Grande Western Railroad Company ("Rio Grande") against the Brotherhood of Railroad Trainmen ("Brotherhood"), certain officers of the Brotherhood, and members of the Brotherhood employed by the Rio Grande. The suit sought to recover damages resulting from a strike by the Brotherhood against the Rio Grande in violation of the provisions of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). The Rio Grande is a corporation organized under the laws of the State of Delaware. It owns and operates a railroad system extending from Denver, Colorado Springs and Pueblo, Colorado, to Salt Lake City and Ogden, Utah, with numerous branches on those lines. Its principal place of business is in Denver, Colorado, and 63 per cent of its line of road is situated in Colorado (R. 68, 73).

The Brotherhood of Railroad Trainmen, an unincorporated association which holds representation rights on most of the railroads in the United States,[1] consists of a Grand

[1] The Thirty-first Annual Report of the National Mediation Board, for the fiscal year ended June 30, 1965, shows that the Brotherhood represents one or more classes or crafts of railroad employees on 91 railroads. This data is limited to "selected rail carriers" and thus does not reflect fully the extent of the Brotherhood's representation rights. (Thirty-First Annual Report of National Mediation Board for the fiscal year ended June 30, 1965, pp. 78-86.)

Lodge with headquarters at Cleveland, Ohio, and subordinate lodges located on the lines of such railroads (R. 7, 68). The Brotherhood is the designated representative of trainmen employed by the Rio Grande. As provided in the Brotherhood's Constitution and General Rules, the local lodges on each railroad elect a General Grievance Committee and a General Chairman thereof, for the purpose of performing the Brotherhood's representation functions under the Railway Labor Act (R. 5, 6). On the Rio Grande, R. E. Carroll was the General Chairman at the time of the strike involved in this litigation and at the time of the proceedings in the lower courts. Mr. Carroll maintains his headquarters at Denver, Colorado (R. 5-7, 10, 68-69, 92).

In accordance with the authority vested in him by the provisions of the Constitution and General Rules of the Brotherhood of Railroad Trainmen, General Chairman Carroll submitted certain claims to the First Division of the National Railroad Adjustment Board on behalf of employees of the Rio Grande, based on alleged violations of the collective bargaining agreement between the Rio Grande and the Brotherhood (R. 78). Subsequently, the National Railroad Adjustment Board issued awards 19372 and 19389 sustaining the claims (R. 78). The Board awarded a full day's pay to each claimant for each occasion on which it found a violation of the agreement, despite the fact that the claimants had suffered no monetary loss. Because it was convinced that the payments called for by the awards were arbitrary and unreasonable, the Rio Grande declined to comply with the awards.[1] In such

[1] In the enforcement actions instituted after the strike in question was found to be unlawful, the courts held that nominal damages, rather than a full day's pay, was the proper measure or damages since the employees involved had not suffered any monetary loss as as a result of the claimed violations of the agreement. *Brotherhood of Railroad Trainmen* v. *Denver & Rio Grande Western R. Co.*, 338 F. 2d 407 (10th Cir., 1964), cert. denied, 380 U.S. 972.

circumstances, an enforcement action is authorized by Section 3, First(p) of the Railway Labor Act. The Brotherhood, however, chose to attempt to compel the Rio Grande to comply with the awards by calling a strike.

On May 16, 1960, representatives of the Brotherhood advised the Rio Grande that the Brotherhood would call a strike on that day to compel the Rio Grande to make the payments called for by the awards (R. 157-158). The strike commenced and lasted until some hours after the United States District Court for the District of Colorado issued a temporary restraining order (R. 20, 93-94). The District Court and the Court of Appeals ultimately held the strike to have been in violation of the Railway Labor Act (45 U.S.C. § 151 *et seq.*). See *Denver & Rio Grande Western R. Co.* v. *Brotherhood of Railway Trainmen,* 185 F. Supp. 369 (D. Colo., 1960), affirmed, 290 F.2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966. This action was subsequently brought in the United States District Court for the District of Colorado to recover damages accruing from diversions of freight to other railroads as a result of the unlawful strike.

Prior to the trial the Brotherhood moved to dismiss the complaint on the grounds, among others, that venue was improper (R. 9). This motion was denied by the District Court on August 29, 1963 (R. 11). The District Court, after a full trial on the merits, concluded that it had jurisdiction of the parties and subject matter under 28 U.S.C. §§ 1331 and 1337, and awarded the Rio Grande a judgment of $37,988.37 against the respondents, having found that because of the strike threat 274 carloads of freight had been diverted from the Rio Grande (R. 79-81).

The Brotherhood appealed from the judgment entered by the District Court. The Court of Appeals reversed the District Court, holding that *Steelworkers* v. *Bouligny, Inc.,*

382 U.S. 145, constituted "a rejection of the principle espoused by the Rutland case", and that venue (1) did not properly lie against an unincorporated association where it did business but (2) was proper only at its principal place of business, which was Cleveland, Ohio. The Court of Appeals also held that the record did not show that R. E. Carroll, the General Chairman of the Grievance Committee on the Rio Grande, had any responsibility for the illegal strike.

REASONS FOR GRANTING WRIT

(1) The Court of Appeals erred in treating this Court's opinion in *Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145, as a rejection of the venue principles established by prior decisions of the federal courts.

The issue of proper venue, raised by motion before trial in the District Court, was decided by Senior Circuit Judge Phillips (R. 11). Relying on *Rutland Railway Company* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962), which is reproduced as Appendix C hereto, the District Court held that the Brotherhood was doing business in Colorado and consequently was a resident of Colorado for venue purposes. The Court of Appeals concluded that (1) this Court's opinion in *Steelworkers* v. *Bouligny*, 382 U.S. 145, was "a rejection of the principle espoused by the *Rutland* case" and (2) that venue as to the Brotherhood would thus be proper only at its principal place of business, i.e., Cleveland, Ohio. (Appendix A *infra*, p. 29.)

In the *Steelworkers* case, however, this Court was not concerned with venue questions and did not discuss or cite any cases dealing with venue principles. The issue presented to this Court in the *Steelworkers* case, as this Court stated it, was "whether an unincorporated labor union is to be treated as a citizen for purposes of federal diversity

jurisdiction, without regard to the citizenship of its members" (382 U.S. 145, 147). The lower court had held that for diversity purposes, the citizenship of an unincorporated association is that of each of its members. This Court affirmed, rejecting the argument that an unincorporated association should be considered an entity and a citizen of the state in which it maintained its principal place of business. In reaching this result, this Court emphasized the fact that if an unincorporated association were treated as a jural entity for diversity purposes with its citizenship determined as if it were a corporation, a considerable expansion of the diversity jurisdiction of federal courts would inevitably follow. This Court, holding that only Congress under Article III of the Constitution can extend the jurisdiction of federal courts, decided that such "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts" (Id. at 150-151). In the present case, jurisdiction is based on alleged violations of a federal statute and the venue question thus does not involve an expansion or contraction of federal court jurisdiction.

The holding of this Court in the *Steelworkers* case, that the citizenship of each individual member of an unincorporated association governs for diversity purposes has long been recognized. *Chapman* v. *Barney*, 129 U.S. 677. In the *Steelworkers* case, this Court was thus adhering to a long established principle applicable to unincorporated associations. The federal courts, however, have distinguished between the principles applicable when determining the citizenship of an unincorporated association for diversity jurisdiction and those relevant to a determination of the inhabitancy or residence of an unincorporated association for venue purposes. These different principles have coexisted and there is nothing about the *Steelworkers* case which indicates any intent to change that situation.

Insofar as venue problems are concerned, *Sperry Products* v. *Ass'n of American Railroads*, 132 F.2d 408 (2d Cir. 1942) cert. denied 319 U.S. 744, initiated the approach followed by the District Court in the present case. The court in *Sperry Products* was concerned with the inhabitancy of an unincorporated association under a venue statute applicable to patent litigation. Judge Learned Hand approached the problem by referring to the principles controlling such an issue for purposes of jurisdiction, stating:

> ". . . [I]n the matter of jurisdiction over the subject matter, an unincorporated association is disregarded: when for example jurisdiction depends upon diversity of citizenship, it is the citizenship of the members alone which counts. Levering & Garrigues Co. v. Morrin, 2 Cir., 61 F.2d 115. Thus, for most purposes the law still looks at such associations as mere aggregations of individuals." (pp. 410-11.)

Judge Hand held, however, that different principles should determine the venue question before him, stating:

> "Since, however, for the purpose of suit it [United Mine Workers v. Coronado Coal Co., 259 U.S. 344; Rule 17(b) of Federal Rules of Civil Procedure] has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48 Jud. Code, 28 U.S.C.A. § 109, in its application to an unincorporated association it seems inevitable that we should attribute an 'inhabitancy' to it as though it were a single jural person and not an aggregate." (p. 411.)

Having thus emphasized that different principles apply in determining inhabitancy of an unincorporated association for venue purposes as contrasted with determination

of citizenship for jurisdictional purposes, Judge Hand went on to hold that an unincorporated association should be assimilated to a corporation in order to determine its inhabitancy for venue purposes. Following this approach, the unincorporated association was held to be an inhabitant of the judicial district in which it maintained its principal place of business.

Although Judge Hand's decision involved the venue provisions of statutes relating to patent infringement actions, federal courts applied his reasoning to the determination of questions arising under the general venue statute. Prior to 1948 the general venue statute (28 U.S.C. § 112 (1940)) provided that "no civil suit shall be brought in any district court against any person . . . in any other district than that whereof he is an inhabitant." Accordingly Judge Hand's discussion of the requirements of the patent statute was equally relevant to the general venue requirements.

The venue provisions of the United States Code were amended in 1948. Paragraph (b) of § 1391, as amended, merely rephrased the prior law. Paragraph (c), however, extended venue over corporations from the state of incorporation, to any judicial district in which licensed to do business or doing business. Under paragraph (c) all of these locations are regarded as the residence of the corporation. (See Appendix B, p. 28.)

In *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (2d Cir. 1962), certiorari denied, 372 U.S. 954, the court, following Judge Hand's opinion in the *Sperry* case in light of § 1391(c), held that the residence of unincorporated associations should be assimilated to the residence of corporations, stating (at pp. 29-30, Appendix C, p. 41.)

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial dis-

tricts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958)."

In reaching this result the Court of Appeals for the Second Circuit was careful to note that "Venue in the federal courts is not a jurisdictional concept." (307 F.2d 21, 29, Appendix C, p. 40.)

Thus the essential issue presented to the Court in the *Rutland* case was whether or not the process initiated by Judge Hand in the *Sperry Products* case should be continued by applying to unincorporated associations the corporate venue requirement of the Judicial Code as amended in 1948, just as Judge Hand had applied such requirements to unincorporated associations prior to the 1948 amendments. As stated, the issue before this Court in the *Steelworkers* case did not involve any such question. This Court did not cite nor purport to disapprove of cases such as the *Rutland* case involving venue determinations. In substance and effect, this Court approved the prior decisions relating to diversity jurisdiction and refused to attribute to unincorporated associations a citizenship apart from the citizenship of all of its individual members. This holding with respect to the citizenship of unincorporated associations is wholly irrelevant to the venue issue presented here.

If the holding of the Court of Appeals in this case is correct, it must be assumed that this Court in the *Steelworkers'* case overruled a long line of cases without the slightest reference to them and that it established basic venue doctrine without any mention of the subject. This Court's opinion, however, indicates that it was most careful to confine its holding to the precise issue before it. Thus, this Court's statement of the issue carefully limits it to a determination of the citizenship of an unincorporated labor union "for purposes of federal diversity jurisdiction" (382 U.S. 145, 147). In its evaluation of the arguments advanced by counsel representing the unincorporated association, the Court limited itself to "the force of these arguments in relation to the diversity jurisdiction" (382 U.S. 145, 150). The concluding paragraph of the Court's opinion emphasizes again that its decision is limited to the status of unincorporated labor unions "for diversity purposes." We respectfully suggest that the decision by this Court, affirming its prior determinations with respect to the status of unincorporated associations for diversity purposes, can not and should not be read to accomplish the rejection of numerous cases and principles which have prevailed for many years with respect to the venue of federal courts.

(2) The decision of the Court of Appeals squarely conflicts with the decision of the Court of Appeals for the Second Circuit in *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), certiorari denied 372 U.S. 954. In the *Rutland* case (reproduced as Appendix C hereto), the Court held that venue for an unincorporated association is proper in any judicial district in which it does business. As shown by the fore-

going discussion, the reasoning in the *Rutland* case is based upon Judge Learned Hand's decision in *Sperry Products* v. *Ass'n of American R.R.'s*, 132 F.2d 408 (2d Cir. 1942), cert. denied 319 U.S. 744. The decision in the present case, holding that venue as to an unincorporated association is proper only where it maintains its principal place of business, is obviously in conflict with the *Rutland* case. It is essential, therefore, that this conflict relating to an important matter of procedure in the federal courts be resolved by this Court.

It is particularly significant that the conflicting decisions involve the same basic facts and a common unincorporated association. In the *Rutland* case, the Brotherhood of Railroad Trainmen was one of the four appellants raising the venue question (307 F.2d 21 at p. 24). Moreover, the activities of the Brotherhood upon which the Court predicated its conclusion that venue was proper in Vermont are the same as those shown by the record in the present case. These activities were described by the Court in the *Rutland* case as follows:

> "Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss." (p. 30, Appendix C, pp. 41-42.)

The Colorado activities of the Brotherhood also include a General Grievance Committee with headquarters at Denver, a strike of railroad employees in Colorado, and negotiations with the Rio Grande in Colorado (R. 92-94, 157-58).

As matters now stand under the conflicting federal decisions, the Brotherhood of Railroad Trainmen may be held accountable for an illegal strike in the judicial district in which it incurs such liability, if the scene is laid in New York, Vermont or Connecticut. But if the illegal strike occurs in Arizona, Colorado, Kansas, New Mexico, Oklahoma, or Utah, the plaintiff carrier must proceed to Cleveland, Ohio, in order to secure redress.[1] It is most difficult, therefore, to imagine a more fundamental conflict than that presented by the decision of the Court of Appeals in the *Rutland* case, and the present decision.

Moreover, the conflict is more widespread than indicated above since the principle articulated by the *Rutland* case has been followed in other jurisdictions. The prevalance of the *Rutland* principle is indicated by the following cases: *American Airlines, Inc.* v. *Air Line Pilots Association, International*, 169 F. Supp. 777, 782, (S.D.N.Y., 1958); *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922 (S.D.N.Y., 1955); *Eastern Motor Express* v. *Espenshade*, 138 F. Supp. 426 (E.D.Pa., 1956); and *Chicago & North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers*, 202 F. Supp. 277 (S.D.Ia., 1962). These cases are approved by Professor Moore in 1 Moore's Federal Practice (2d ed.),p. 1508, where the author states:

> "The position taken by these courts is desirable and there is a built-in protection from abuse contained in 28 USC § 1404(a). Although 28 USC § 1391 does not on its face apply to unincorporated associations, where [as here] an unincorporated association carries on multi-state activities, application of its principle is certainly justified."

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[1] The Brotherhood of Railroad Trainmen holds representation rights on railroads operating in all of these states, as shown by the Thirty-First Annual Report of the National Mediation Board, pp. 78-86.

To the same effect see Note, Federal Venue for Unincorporated Associations, 44 Calif. L. Rev. 130, 140 (1956); Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1080 (1963).

The only case since 1948 where it appears that a court refused to follow the principle that an unincorporated association should have the same venue as a corporation under § 1391(c) is *Cherico* v. *Brotherhood of R.R. Trainmen*, 167 F. Supp. 635 (S.D.N.Y., 1958). The *Cherico* case was later rejected, however, by the Court of Appeals for the same circuit in *Rutland Railway Co.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21, 29 (2d Cir. 1962).

A reading of the other post-1948 cases which superficially appear to follow the proposition that an unincorporated association only resides for venue purposes at its principal place of business, shows that they failed to consider the problem in light of § 1391(c) and that they merely relied upon the decision in the *Sperry* case for this conclusion.[1]

With respect to unincorporated associations such as the union here, which transacts business in many states, the application of the principles of the *Rutland* case is entirely justified. The union here suffered no undue hardship because it was required to stand suit in Colorado. There is

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[1] Section 1391(b) of the venue statute was amended by Public Law 89-714, approved on November 2, 1966, by addition of the italicized words in following quotation of that Section:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *or in which the claim arose,* except as otherwise provided by law."

The intended scope and application of the amendment is unclear. In any event, the amendment does not resolve the conflict created by the decision of the Court of Appeals as to the residence of unincorporated associations for venue purposes.

a built-in protection in § 1404(a) of 28 U.S.C. for the union if in certain instances the defense of a suit is peculiarly oppressive in a particular district. In the instant case, venue is especially appropriate in the District of Colorado, for the respondent's activities in question took place there, the Brotherhood concededly does business there, and respondent Carroll resides there (R. 5, 6-8, 10, 92).

(3) Even if the principles affirmed by this Court in *Steelworkers* v. *Bouligny*, 382 U.S. 145 are relevant to venue questions, the lower court's resolution of what it described as the vital venue issue in the present case is inconsistent with the *Steelworkers* decision. The Court of Appeals stated the question to be decided as follows:

> "Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado or in Cleveland, Ohio, where its headquarters and principal place of business is located." (Appendix A, *infra*, p. 26.)

Apparently the court below resolved the issue thus posed by deciding that the Brotherhood is a resident of Cleveland, Ohio, where it has its principal place of business. This result, however, can only be reached by treating the Brotherhood, an unincorporated association, as an entity and thus arriving at a result comparable to that reached by Judge Learned Hand in the *Sperry Products* case. As the preceding discussion shows, Judge Learned Hand reached this result by assimilating an unincorporated association to a corporation. In the absence of such assimilation, the unincorporated association would be regarded as an inhabitant or resident of the places inhabited by its members or at which its members reside. Judge Learned Hand recognized this consequence, stating:

> ". . . for most purposes the law still looks at such associations as mere aggregations of individuals." (132 F.2d 408, 411.)

A similar result would follow from applying the rationale of the *Steelworkers* case to the venue problem here involved. This Court in the *Steelworkers* case recognized that unless it treated the unincorporated association as a corporation for purposes of determining its citizenship, "the generally prevailing principle that an unincorporated association's citizenship is that of each of its members" would control for diversity purposes (382 U.S. 145, 146). Consequently, if the decision of this Court in the *Steelworkers* case is controlling, then the residence of the Brotherhood for venue purposes would necessarily be the residence of each of its members, not its principal place of business. Thus, the *Steelworkers* decision can not possibly be used to arrive at the result indicated by the court below. A proper application of the rationale of the *Steelworkers* decision would require the court below or other courts that follow its reasoning to reject both of the alternatives posed in the statement of the crucial issue quoted above (Appendix A, *infra*, p. 26). Under the principles espoused in the decision of this Court in the *Steelworkers* case, the residence of the Brotherhood would not be Colorado or Cleveland, Ohio, but would be all of the many states or judicial districts in which its members reside. In the case of the Brotherhood of Railroad Trainmen, which has members in virtually every judicial district, venue would never be proper in a federal court since there is no single district in which all of its members reside.

Insofar as the views of this Court on the venue problem in this case are concerned, the recent decision in *Pure Oil Company* v. *Suarez*, 384 U.S. 202, is considerably more relevant than the *Steelworkers* decision. In the *Pure Oil* case this Court had before it the venue requirements of the Jones Act which provided that venue would be proper in the district in which the defendant employer resides or in which

his principal office is located. This Court stated the issue and its resolution thereof as follows:

> "Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co.* v. *Johnson*, 264 U.S. 375. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence had been redefined by the expanded general venue statute, 28 U.S.C. § 1391(c) (1964 ed.), passed in 1948. That statute provides:
>
> > "'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes.' (Emphasis added.)
>
> "If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper." (pp. 203-204.)

This Court stated the controlling principle as follows:

> "Although there is no elucidation from statutory history as to the intended effect of § 1391(c) on special venue provisions, the liberalizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." (pp. 204-205.)

The substance of this Court's decision in the *Pure Oil* case is that the more recent definition of residence for

venue purposes contained in the general venue statute should be applied to the venue requirement of the Jones Act, although the amendment to the general venue statute does not expressly indicate an intent to thus amend the requirements of the Jones Act. The same approach in the present case would require the result reached by the Court of Appeals for the Second Circuit in the *Rutland* case. The essential effect of the *Rutland* case was to update the concepts formulated by Judge Hand in *Sperry Products* to make them consistent with the 1948 amendments, just as the *Pure Oil* case updated the Venue provisions of the Jones Act.[1]

(4) The Court of Appeals clearly erred in setting aside the findings of the District Court with respect to the liability of respondent R. E. Carroll. The District Court's judgment holding R. E. Carroll liable for the damages accruing from the unlawful strike was correct and should have been affirmed by the court below. R. E. Carroll's responsibility for the strike in question is most conclusively fixed by the documents of record relating to the institution and cessation of that illegal withdrawal from service. With respect to the institution of the strike, counsel for the Brotherhood stated that the strike was called "pursuant to a letter that was sent to the railroad on

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[1] Assuming that venue was improper as to the Brotherhood at the time the Court of Appeals rendered its decision, the decision to *dismiss* the action was erroneous for the following reasons: (a) There was a full trial on the merits and there is no indication that the Brotherhood was inconvenienced in any manner; accordingly, if venue was improper this was at most harmless error. *Whittier* v. *Emmet*, 281 F.2d 24 (D.C. Cir. 1960), 1 Moore, Federal Practice (2d ed.), pp. 1964-1965. (b) Pursuant to § 1406(a), the Court of Appeals should have remanded the case to the district court to determine whether, in the interest of justice, the case should be transferred rather than dismissed. *Hayes* v. *Livermont*, 279 F.2d 818 (D.C. Cir. 1960).

May 16 . . ." (R. 25). The crucial document thus identified is a letter addressed to the Rio Grande stating that "the strike of brakemen is reset for 2:00 p.m., May 16, 1960" (Plaintiff's Exhibit 1, R. 157-58). This letter emanating from respondent Carroll's Denver office, is signed by two individuals, R. H. McDonald, Vice President of the Brotherhood of Railroad Trainmen, and R. E. Carroll, General Chairman of the Brotherhood of Railroad Trainmen. It is clear from this document that the overall responsibility of the Brotherhood in the premises was shared by R. E. Carroll as the General Chairman of the Brotherhood of Railroad Trainmen and Mr. McDonald as a vice president of the Brotherhood of Railroad Trainmen.

With respect to the termination of the strike, respondent Carroll testified that he issued instructions "calling off the strike" and that he did that through "telephoning and sending the telegrams" (R. 93). It is clear from respondent Carroll's testimony on this subject that his authority in the premises was primary and that his instructions were final and determinative as to whether the strike was to continue or terminate. Accordingly the District Court correctly found and concluded that respondent Carroll was responsible for, and was liable for the damages resulting from the unlawful strike.

The Court of Appeals suggested that since the local chairmen were dismissed from the action, R. E. Carroll also should have been dismissed (Appendix A, *infra*, p. 27). Insofar as the local chairmen are concerned, there is no evidence of record that they were responsible for instituting the strike in question. The significant difference in the record between respondent Carroll's situation and the situation of the local chairmen was, in fact, recognized by counsel for the Brotherhood during the trial in the District Court. At the time of the pretrial conference when the documents

referred to above had been produced, counsel for the respondents stated:

> "Any of the documents that have been produced would only show that Mr. Carroll was the only one who had any connection with it at all." (R. 33.)

At the conclusion of the trial in the District Court the proposed findings submitted by the respondents recognized this state of the record. Thus, proposed finding No. 7, submitted by respondents, was as follows:

> "The Trial record does not sustain the allegations of the complaint with respect to B. E. Roark, A. J. Myers, J. W. Crocker, M. C. Brown, Carl F. Ahrens, N. E. Doolittle, and M. C. Feather. These defendants are not shown to have participated in any way in the calling or conduct of the strike nor is there any evidence with respect to their relationship, if any, with the Brotherhood." (R. 69.)

Respondent Carroll is not among the individuals listed in this proposed finding.

Counsel for respondents emphasized both the absence of any evidence or responsibility on the part of the local chairmen and the undoubted responsibility of respondent Carroll at the conclusion of the trial, as shown by the following:

> "The Court: There is another matter I think we might iron out here and now. The case is against the Brotherhood of Railroad Trainmen and certain named individuals.
>
> "Now, with the exception of Mr. Carroll, I haven't heard any testimony about these other individuals.
>
> "Mr. Cummings: That was briefed before Judge Phillips, Your Honor, and—
>
> "Mr. Highsaw: The question that was briefed before Judge Phillips, Your Honor, was whether or not hav-

> ing named these people in the complaint they had properly stated a class action, but now we have had in evidence and the record is closed on the question of the strike and I agree with you there is no evidence at all that anyone had anything to do with this strike other than the Brotherhood and Mr. Carroll, ..." (R. 155.)

It is apparent, therefore, that at the conclusion of the proceedings in the District Court there was agreement between all of the parties that responsibility for the strike was that of respondent Carroll and the Brotherhood.

The Court below also suggested that respondent Carroll "was not an officer of the union" (Appendix A, *infra*, p. 27). When respondent Carroll testified in this action he identified himself as "General Chairman of the General Grievance Committee, Brotherhood of Railroad Trainmen on the D&RGW" (R. 92). An affidavit by respondent Carroll reiterates his official capacity as "Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Denver And Rio Grande Western Railroad System." (R. 10.)

The General Grievance Committee, of which respondent Carroll is the Chairman, is the agency through which the Brotherhood functions insofar as its representation rights on the Rio Grande are concerned and respondent Carroll, of course, is the head of that instrumentality. Perhaps the clearest proof of the important official capacity which respondent Carroll occupies in the Brotherhood is the fact that the basic collective bargaining agreement between the Rio Grande and the Brotherhood is signed on behalf of the Brotherhood by Carroll alone. There is no other Brotherhood signatory to that agreement, which Carroll signed as "General Chairman, Brotherhood of Railroad Trainmen." This agreement is referred to by the court below in a footnote of its Opinion (Appendix A, *infra*, p. 25). It is also

referred to by the Brotherhood in its suggested findings (R. 68), and there are other references to it in the record before this Court.

This case was tried by the District Court without a jury. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, in such cases the "findings of fact shall not be set aside unless clearly erroneous." This Court has stated in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948) that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We most respectfully submit that the entire evidence shows that respondent Carroll is not only an officer of the Brotherhood but is the governing officer of that organization on the Rio Grande. Accordingly the District Court's determination that respondent Carroll was responsible for the damages caused by the Brotherhood's unlawful strike was clearly correct and the action of the Court of Appeals in setting it aside was erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST PORTER,
KENNETH D. BARROWS,
MARTIN M. LUCENTE,
RICHARD H. COMPERE,
GEORGE L. SAUNDERS, JR.,

Attorneys for Petitioner

SIDLEY, AUSTIN, BURGESS & SMITH
Of Counsel

November 22, 1966

STATE OF ILLINOIS }
COUNTY OF COOK } ss

AFFIDAVIT OF SERVICE

Richard H. Compere, being first duly sworn, on oath deposes and states that he has served the attached petition for writ of certiorari upon counsel for respondent by placing copies of the same in a United States mail box, with first class air mail postage prepaid, addressed to:

PHILIP HORNBEIN, JR.
2007 Security Life Building
Denver, Colorado 80202

JAMES L. HIGHSAW, JR.
Suite 620 Tower Building
Washington, D. C. 20005

Richard H. Compere
RICHARD H. COMPERE

Subscribed and sworn to before me this 22nd day of November, 1966.

Robert M. Brayfield
NOTARY PUBLIC

APPENDIX A

Filed United States Court of Appeals, Tenth Circuit, Sep. 21, 1966, Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—1966

BROTHERHOOD OF RAILROAD TRAINMEN and R. E. CARROLL, Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Appellee.

NO. 8196

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein, and Mulholland, Hickey & Lyman on the brief) for Appellants.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere, and Sidley, Austin, Burgess & Smith on the brief) for Appellee.

Before MURRAH, Chief Judge, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

Seeking damages alleged to have resulted from an unlawful strike, the Denver & Rio Grande Western Rail-

road Company, a Delaware corporation with its principal place of business in Denver, Colorado, brought this tort action against the Brotherhood of Railroad Trainmen,[1] the chairmen of the Brotherhood of Railroad Trainmen locals in Colorado, and R. E. Carroll, representing the Brotherhood on the Rio Grande as Chairman of the General Grievance Committee. The trial court overruled the Brotherhood's motion to dismiss, which included an allegation that venue of the action did not lie in the United States District Court for the District of Colorado. Following a trial, the local chairmen were dismissed from the action, and judgment in the sum of $37,988.37 was entered against the Brotherhood and Carroll. This appeal followed.

The National Railroad Adjustment Board made two awards for the payment of money to the Brotherhood, which the Railroad refused to pay. On May 16, 1960, at 2:00 P.M., a strike was called on the property of the Rio Grande for the purpose of compelling payment of the awards. At about 6:30 P.M. on the same day, a temporary restraining order enjoining continuance of the strike was served upon Carroll. A few hours later the strike was discontinued over the entire system and never renewed. Thereafter, holding the strike to be illegal, the district court issued a preliminary injunction which became permanent on July 27, 1960. (185 F. Supp. 369, aff'd 294 F.2d 266). Meanwhile, believing that a strike threat still existed, several shippers, principally Ford and its suppliers, between May 19th and June 1, 1960, diverted freight shipments from Rio Grande lines. It is for the loss of revenue caused by these diversions that the district court allowed recovery.

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[1] The Brotherhood was the duly certified representative under the Railway Labor Act of certain employees of the Rio Grande, and at all times during this controversy there was in effect a collective bargaining agreement.

At the outset, we are confronted with the contention that venue of the action does not lie in the United States District Court for the District of Colorado. The venue statute, 28 U.S.C. § 1391(b), states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Venue here depends upon whether the Brotherhood is held to reside within the judicial district of Colorado, or in Cleveland, Ohio, where its headquarters and principal place of business is located. Section 1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and shall be regarded as the residence of such corporation for venue purposes."

Relying upon Rutland Ry. Corp. v. B. of R. T., 2 Cir., 307 F.2d 21, and like authorities holding that incorporated associations, including unincorporated national labor unions, should be treated as corporations,[2] the district court upheld venue. Subsequent to the entry of judgment, the Supreme Court, in Steelworkers v. Bouligny, Inc., 382 U.S. 145, while recognizing the validity of the reasoning in cases like Rutland, held that an unincorporated labor union was not yet in the same category as a corporation, and that if such unions were to be treated as corporations, the change should be made by Congress and not by judicial determina-

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[2] The rule is stated in the Rutland case as follows:

> "Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business."

tion. Although the court in the Bouligny case was discussing the diversity statute, the holding was clearly to the effect that unincorporated associations were basically different from corporations. It was a rejection of the principle espoused by the Rutland case, upon which the Rio Grande relies to sustain venue. For venue purposes, the Brotherhood is not a resident of Colorado as required by § 1391(b), and consequently, the complaint must be dismissed.

The Railroad suggests that even if venue did not exist as to the Brotherhood, the proper procedure would be to drop it from the case and let the judgment stand against Carroll, a Colorado resident. Carroll was Chairman of the General Grievance Committee on the Rio Grande; he was not an officer of the union. So far as the record shows, Carroll's role in connection with the strike was limited to sending the Railroad notice of the Brotherhood's strike decision and thereafter advising the local unions of the issuance of the restraining order. Carroll had no more to do with causing the strike than did the chairmen of the locals, and accordingly, he too should have been dismissed from the action.[3]

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[3] The trial court found only that Carroll was "General Chairman of the General Grievance Committee of the Brotherhood on the property of the plaintiff" and that he notified the local groups to call off the strike after service of the temporary restraining order.

REVERSED.

APPENDIX B

§ 1391 of Title 28, United States Code. Pertinent provisions are:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Rule 52(a) of the Federal Rules of Civil Procedure:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963."

APPENDIX C

RUTLAND RAILWAY CORPORATION,
Plaintiff-Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al., Defendants-Appellants.

No. 259, Docket 26760.

United States Court of Appeals
Second Circuit.

Argued March 8, 1962.
Decided June 18, 1962.

Thomas Wm. Lynch, Rutland, Vt. (Clark, Carr & Ellis, by Charles D. Peet, Donald L. Wallace, Harry F. Martin, Jr., New York City, of counsel), for plaintiff-appellee.

Philip H. Hoff, Burlington, Vt., Harold N. McLaughlin, Harold A. Ross, Cleveland, Ohio, Donald W. Fisher, Toledo, Ohio (Harold C. Heiss, Cleveland, Ohio, V. C. Shuttleworth, Cedar Rapids, Iowa, Wayland K. Sullivan, Cleveland, Ohio, Black, Wilson & Hoff, Burlington, Vt., Marshman, Hornbeck, Hollington, Steadman & McLaughlin, Cleveland, Ohio, of counsel), for defendants-appellants.

Before WATERMAN, KAUFMAN and MARSHALL, Circuit Judges.

WATERMAN, Circuit Judge.

The four appellant labor unions, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brother *(sic)* of Railroad Trainmen, and the Order of Railroad Conductors and Brakemen, hereinafter referred to collectively as the defendant brotherhoods, and the five individual appellants, each either a gen-

eral or local chairman of one of the above-mentioned brotherhoods, appeal from a judgment order of the United States District Court for the District of Vermont, enjoining as of October 27, 1960, the unions, their members, and agents from further striking, picketing or using any other form of economic coercion in connection with a dispute which the plaintiff Rutland Railway Corporation had submitted to the National Railroad Adjustment Board, the injunction to remain in effect until the Board had disposed of the dispute.

The strike began on September 16, 1960. It continued until the injunction order was effective. Then, obedient thereto, the workers went back to their jobs.

The Rutland Railway operations are divided into three subdivisions. One subdivision runs from the New Hampshire border at Bellows Falls, Vermont, to Rutland, Vermont, and is approximately 52 miles long. The main line subdivision runs northerly from the southwestern corner of the State of Vermont through North Bennington, Rutland, and Burlington, Vermont, to the northern tip of Lake Champlain at Alburg, Vermont, a distance of about 155 miles. At Alburg the road proceeds westerly across northern New York State through Malone and Norwood, New York, to Ogdensburg, New York, a distance of one hundred twenty-two miles. Malone is halfway between Alburg and Ogdensburg. Norwood, between Malone and Ogdensburg, is 35 miles from the former and 25 miles from the latter. The portion of the line from Alburg to Ogdensburg is called the Ogdensburg Subdivision.

On November 2, 1959, the Rutland Railway, which had been in financial difficulty, sent notices to the general chairmen of the four defendant brotherhoods, as the duly recognized representatives of the Rutland's operating employees, to inform the labor organizations that the carrier

proposed, among other things, to change all existing agreements and rules which would prevent it from consolidating and abolishing crew terminals, merging seniority districts, and establishing interdivisional runs.[1] As part of a con-

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[1] The relevant part of the notices given by the Rutland were as follows:

"We hereby give notice, under our existing agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we propose to revise and supplement such agreement or agreements in accordance with the proposal set forth in 'Attachment A' appended hereto.

"ATTACHMENT A

• • •

"ROAD TRAIN AND ENGINE SERVICE ASSIGNMENTS.

"A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which

"(i) prohibit or impose restrictions on the right of the carrier to establish, move, merge or consolidate seniority districts.

"(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, inter-seniority district, intra-divisional or intraseniority district runs.

"(iii) prohibit or provide penalties for running crews through established crew terminals, or

"(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

"B. Establish a rule to provide that

"1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts, and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turn-around (including short turn-around) basis and through established crew terminals.

• • •

"2. No rule, regulation, interpretation or practice, however established shall be construed to in any way prohibit,

certed country-wide effort to initiate national discussion of railroad problems most of the Class I carriers in the nation also delivered similar notices to brotherhood officers.

The issuance of these notices was required by Section 6 of the Railway Labor Act, 44 Stat. 582 (1926), as amended, 45 U.S.C.A. § 156.[2] At the time these notices were sent the

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restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

* * * * * * * * * * * * *

"(b) Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees, and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman * * *

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

[2] The section reads:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Rutland Railway had collective bargaining agreements with the brotherhoods.

On November 30, 1959, conferences between representatives of the Rutland and representatives of its employees were commenced in order to consider the proposals contained in the Section 6 notices sent November 2. The parties failed to reach agreement on any of the proposals, and the conferences were soon recessed. The railroad then delegated authority to the Carriers' Eastern Conference Committee to further confer on behalf of the Rutland, and the labor representatives delegated their authority so to do to the National Conference Committee of the four brotherhoods.[3]

The Rutland's financial plight continued to worsen. In the first eight months of 1960 it was hauling 5300 carloads of freight less than it was hauling in the comparable period of 1959. Its operating revenues were $264,000 less than those of the same period in 1959. Therefore the railroad's board of directors met in the spring and summer of 1960

[3] The representatives of the employees countered with proposals of their own, served by a Section 6 notice on September 7, 1960. National conferences on these controversies were suspended when the Presidential Railroad Commission was established on November 1, 1960. The President authorized and directed the Commission "to investigate and inquire into the issues raised by the proposals of the parties involved in the above-mentioned controversy with the objective of making a report to the President, including its findings and recommendations with respect to the controversy, and assisting in achieving an amicable settlement and agreement with respect to issues in dispute between the parties." The Commission rendered its report and recommendations on February 28, 1962. As yet, no agreement between labor and management has been reached on the railroads' proposals to change all rules preventing consolidation of crew terminals, merger of seniority districts and establishment of interdivisional runs.

in order to devise methods for combatting the company's financial problem. A plan was finally agreed upon whereby certain operating expenses would be reduced by the abolition of several freight runs.

On its Ogdensburg Subdivision, which stretched from Alburg, Vermont, to Ogdensburg, New York, the Rutland had operated a total of four freight trains and two yard switchers. From east to west on the Ogdensburg Subdivision, there were terminals at Alburg, Vermont; Malone, New York; Norwood, New York; and Ogdensburg, New York. Two of these trains operated daily in opposite directions between Alburg and Norwood. The two other trains operated out of Malone, one going to Ogdensburg and returning each day, the other going to Alburg and returning each day. Pursuant to the decision of its directors to reduce the number of freight runs, the railroad posted bulletins on September 8, 1960, announcing that beginning September 17 the four existing daily freight runs on the Ogdensburg Subdivision were to be replaced by two, running daily between Alburg and Ogdensburg in opposite directions. This new schedule would reduce the number of jobs on the subdivision by ten and would change the home terminals of some of the trainmen whose jobs were not eliminated.

On September 14 the railroad learned that its employees would strike in an attempt to prevent these new schedules from becoming effective. On the morning of September 15 the brotherhoods, obviously referring to the schedule changes on the Ogdensburg Subdivision, telegraphed the railroad that they would go on strike at 12.01 A. M., September 16 because "carrier cancelling 1957 and 1959 agreements by bulletins and changing home terminals and running thru former terminal for certain local freight crews." The railroad replied in part as follows:

> "Rutland Railway Corporation effective Sept. 17, 1960 will arrange train assignment to conform to the de-

mands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the [brotherhoods]."

The operating employees punctually struck at the time indicated by the brotherhoods' telegram that the strike would begin.[4]

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[4] Meanwhile, another dispute was raging between the Rutland Railway and its employees. This second dispute was only tangentially related to the dispute spelled out in the text. In August 1960 the brotherhoods asked for pay increases for the employees whom they represented. A conference to negotiate this dispute convened on August 30, eight days prior to the September 8 bulletin. The president of the railroad explained to the labor representatives that the financial condition of the carrier made it impossible for management to meet the wage demands of the unions but he stated that if certain rule changes were agreed to by the unions the savings from these changes might permit increases in pay. The changes proposed by the railroad were these:

1. Eliminate all arbitraries.
2. Open closed yards—the only closed yard on this property is Rutland yard, closed to trainmen (yardmen).
3. Dovetail rosters, each craft, Vermont and New York divisions.
4. Make provisions for operating road switchers.
5. Provide for operation of trains between assigned terminals so that wage payments will equal the miles run and/or an 8 hour day.

The brotherhoods contended at the district court hearing that a spokesman for the management explained that change No. 5 meant the running of trains through established home terminals, but the district court refused to make such a finding. The August 30 conference ended without success. On September 7, 1960 (see footnote 3), the general chairman of the Brotherhood of Railroad Trainmen served a Section 6 notice on the railroad asserting that the brotherhood desired to change existing rates of pay and rules. On Septem-

Ten days later, on September 26, the railroad filed a complaint in the United States District Court for the District of Vermont, asking the court to enjoin a further strike, to order the defendants to comply with the procedural requirements of the Railway Labor Act, and to award damages to the plaintiff.

To support its claim for an injunction the railroad, defining the disagreement with its employees to be whether the management of the railroad had the right to rearrange train runs and thereby reduce jobs and change crew terminals without first negotiating the matter with the representatives of its workers, promptly submitted the dispute to the National Railroad Adjustment Board under the "minor dispute" provisions of the Railway Labor Act, §§ 2 Second, Sixth, 3, 44 Stat. 577, 578 (1926), as amended, 45 U.S.C.A. §§ 152 Second, Sixth, 153. On October 7 the defendants moved to dismiss the action because of improper venue. This motion was denied on October 10. The defendants then answered, and filed a counterclaim in which they on their part sought an injunction preventing the railroad from putting into effect the schedule of changes set forth in its bulletins of September 8 until at least the relevant procedures provided by the Railway Labor Act should have been exhausted.

After holding hearings on the merits of the respective claims the district court issued an injunction enjoining the strike. A consideration of the railway's prayer for an award of damages was postponed to a later date. In its opinion, reported at 188 F.Supp. 721 (D.Vt.1960), the

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ber 12, the railroad agreed to submit the union's proposals to national bargaining under the auspices of the National Mediation Board. A National Mediator came to Rutland to mediate this dispute over future wages. There was testimony at the hearing that the Mediator's work did not relate to the dispute over the bulletined changes in train schedules on the Ogdensburg Subdivison.

court held that the dispute out of which the strike arose was a minor one, subject to the jurisdiction and decision of the National Railroad Adjustment Board and that the Section 6 notice of November 2, 1959, sent out by the Class I railroads on the national level did not alter the minor nature of this particular dispute over the rescheduling of freight runs. The court did not grant the defendants' prayer for an injunction to prevent the railroad from effectuating its rescheduling. The defendants appeal to this court, seeking review of the district court decision adverse to them.

The appellants contend that the venue for this action was not properly located in the District of Vermont; that the controversy out of which this litigation arose was not a "minor dispute" as the court below held, but a "major dispute" under the Railway Labor Act, 44 Stat. 577 (1926) as amended, 45 U.S.C.A. §§ 151-163, and that the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, deprived the court of jurisdiction to enjoin the strike. The appellee railroad asserts, on the other hand, that the court below was correct in determining the dispute a minor one which permitted the carrier to proceed with its schedule changes and required that the employees desist from striking.

Venue

Three of the defendant brotherhoods, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, have their headquarters at Cleveland, Ohio. The headquarters of the fourth brotherhood, Order of Railway Conductors and Brakemen, are at Cedar Rapids, Iowa.

Inasmuch as this action arises under the laws of the United States, namely, the Railway Labor Act, the relevant venue provision of the Judicial Code is 28 U.S.C. § 1391(b):

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The brotherhoods assert that, since they are unincorporated associations, the proper venue for an action against any one of them is only in the judicial district where its principal place of business is situated.

In Sperry Prods., Inc. v. Association of Am. R. Rs., 132 F.2d 408 (2 Cir. 1942), cert. denied, 319 U.S. 744, 63 S.Ct. 1031, 87 L.Ed. 1700 (1943), involving the venue provision for patent *infringement actions*, *Judge* Learned Hand discussed the concept of venue as it related to unincorporated associations. The venue statute there involved, 35 Stat. 1084 (1909), 28 U.S.C. § 109 (1940) (now 28 U.S.C. § 1400(b) (1958)), stated that any suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant • • • shall have committed acts of infringement and have a regular and established place of business." Judge Hand stated that for venue purposes, as well as for other procedural incidents, an unincorporated association should be considered a jural entity, cf. United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 (1922), and that the only practical approach to the procedural problems created by actions involving unincorporated associations was to assimilate their treatment to that accorded corporations. Therefore, Judge Hand concluded that an unincorporated association should be considered "present" wherever it was continuously carrying on a substantial part of its activities, since this was the standard for the "presence" of corporations. However, he hastened to add that being "present" in a district was not tantamount to being an "inhabitant" of that district. Again assimilating the situation of the unincorporated en-

tity which has no place of incorporation to that of the incorporated entity, Judge Hand announced that the unincorporated entity was an "inhabitant" of the district of its principal place of business.

Although Sperry Prods., Inc. involved the venue provision for patent infringement actions, courts have applied Judge Hand's reasoning in that case to the determination of questions that have arisen involving the general venue statute. Until the revision of the Judicial Code in 1948 there was little difficulty in so doing because the general venue statute, 28 U.S.C. § 112 (1940), provided only that "no civil suit shall be brought in any district court against any person * * * in any other district than that whereof he is an inhabitant * * *." Thus Judge Hand's discussion of where an unincorporated association was an inhabitant was applicable with equal force under the general venue provision as it then existed. See Brotherhood of Locomotive Firemen, etc. v. Graham, 84 U.S. App.D.C. 67, 175 F.2d 802 (1948), rev'd on other grounds, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949). Cf. Darby v. Philadelphia Transp. Co., 73 F.Supp. 522 (E.D.Pa.1947). But see Thermoid Co. v. United Rubber Workers, 70 F.Supp. 228 (D.N.J.1947). But in 1948 the general venue statute was redrafted as 28 U.S.C. § 1391; and a subsection (c) was added. This subsection stated:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."[5]

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[5] Another difference between the new statute and the old one was that the new one spoke in terms of "residence" instead of "inhabitance"; but it is clear from the Reviser's Notes to § 1391 that the two terms were intended to be synonymous. H.R.Report 308, 80th Cong., 1st Sess. A147 (1947).

Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated association resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence.

The cases are divided on this issue. Some courts have held that for determining venue an unincorporated association resides only at its principal place of business. Brotherhood of Locomotive Firemen, etc. v. Graham, supra; McNutt v. United Gas Workers, 108 F.Supp. 871, 875 (W.D.Ark.1952); Griffin v. Illinois Cent. R. R., 88 F.Supp. 552, 555 (N.D.Ill.1949); Salvant v. Louisville & N. R. R., 83 F.Supp. 391, 396 (W.D.Ky.1949); Cherico v. Brotherhood of R. R. Trainmen, 167 F.Supp. 635 (S.D.N.Y.1958). Cf. Hadden v. Small, 145 F.Supp. 387 (N.D.Ohio 1951). Other courts have held that an unincorporated association may be sued in any district in which it is doing business. Portsmouth Baseball Corp. v. Frick, 132 F.Supp. 922 (S.D.N.Y. 1955); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777 (S.D.N.Y.1958); Eastern Motor Express, Inc. v. Espenshade, 138 F.Supp. 426 (E.D.Pa.1956). And the Supreme Court has not yet spoken on the matter.

Venue in the federal courts is not a jurisdictional concept. See 28 U.S.C. § 1406(b) (1958); H.R.Report 308, 80th Cong., 1st Sess. A154 (1947) (Reviser's Notes). We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience. See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-168, 60 S.Ct. 153, 84 L.Ed. 167 (1939); Cohen v. Commodity Credit Corp., 172 F.Supp. 803 (W.D.Ark.1959); Jacobson v. Indian-

apolis Power & Light Co., 163 F.Supp. 218 (N.D.Ind.1958); The North River, 57 F.Supp. 808 (E.D.N.Y.1944); Vogel v. Crown Cork & Seal Co., 36 F.Supp. 74 (D.Md.1940). It should be treated in practical terms. See Sperry Prods., Inc. v. Ass'n of Am. R. Rs., supra; American Airlines v. Air Line Pilots Ass'n, supra. Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See Cherico v. Brotherhood of R. R. Trainmen, supra. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius,* and so we follow the reasoning in Sperry Prods. and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958).

Turning to the case before us, we hold that the defendant brotherhoods were doing business in the Dis-

trict of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss.

Minor or Major Dispute

We think that there are only two general questions presented by the issues of labor law involved in this case. They are: First, is this a so-called "major" or "minor" dispute under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C.A. §§ 151-163 (1958)? Second, does the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 deprive the district court of jurisdiction to enjoin the strike?

For either of these statutes to be operative, there must be first of all a "labor dispute." The Norris-LaGuardia Act, § 13(c), 47 Stat. 73, 29 U.S.C.A. § 113(c), defines a labor dispute as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Section 2 of the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, sets out the disputes to which it applies as "all disputes concerning rates of pay, rules, or working conditions" and "all disputes growing out of grievances or out of the interpretation or application of agreements

covering rates of pay, rules, or working conditions." In Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960), the Supreme Court explicitly held that a labor dispute existed under the Norris-LaGuardia Act, and implied that one existed under the Railway Labor Act, when a railroad sought to close a number of its stations and thereby reduce employment. The Court stated:

> "Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desired just as plainly referred to 'conditions of employment' of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that '[c]ollective bargaining as to the length or term of employment is commonplace,' is not challenged." Id. at 336, 80 S.Ct. at 764.

Numerous other courts have assumed the presence of labor disputes in similar situations. E. g., Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961); In the Matter of Hudson & M. R. R. Co., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir. 1959), cert. denied, Hatler v. Dawson, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960). Cf. Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959). The court below was correct when it found that a labor dispute relating to working conditions existed when the case was heard on October 20, 1960.

In order to avoid interruptions to transportation resulting from disputes over rates of pay, rules, or working conditions, to provide peaceful and orderly procedures for the settlement of these disputes, and to foster the organization of employees, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, the Railway Labor Act was passed in 1926. 44 Stat. 577, as amended, 45 U.S.C.A. §§ 151-163 (1958). The Act contemplates two types of disputes, major and minor, and provides different procedures for handling each. See Railway Labor Act § 2, 44 Stat. 577 (1926), 45 U.S.C.A. § 151a, Hearings on H.R. 7650, before House Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934); Hearings on S. 3266, before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934). Mr. Justice Rutledge in his oft-quoted opinion for the Court in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), explained the distinction between major and minor disputes under the Railway Labor Act:

> "The first [major dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> "The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal in-

juries. In either case the claim is to rights accrued, not merely to have new ones created for the future." Id. at 723, 65 S.Ct. at 1290.

See also Hearings on H.R. 7650, before House Committee on Interstate Commerce, 73d Cong., 2d Sess. 47 (1934).

In both types of disputes the Act requires that, as a first step, the parties must make every reasonable effort to settle their differences in conference. § 2 First, Second, 44 Stat. 577 (1926), as amended, 45 U.S.C.A. § 152 First, Second. Elgin, J. & E. Ry. v. Burley, supra at 724-725 and nn. 12, 18, 65 S.Ct. supra at 1290-1291. Major disputes commence with the issuance of a notice known as a "Section 6 notice," given by the party seeking to change existing agreements. §§ 2 Seventh, 6, 44 Stat. 577, 582 (1926), as amended, 45 U.S.C.A. §§ 152, Seventh, 156. In major disputes, if settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board. § 5, 44 Stat. 580 (1926), as amended, 45 U.S.C.A. § 155. If mediation fails, the Mediation Board proposes voluntary arbitration to the parties, §§ 5, 7, 44 Stat. 580, 582 (1926), as amended, 45 U.S.C.A. §§ 155, 157, a course of action neither party is required to adopt. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944). Finally, if the President of the United States desires, he is empowered to set up an emergency board to investigate and report to him with respect to the dispute. § 10, 44 Stat. 586 (1926), as amended, 45 U.S.C.A. § 160. The parties are required to comply with each stage in the above-described procedure before either may resort to self-help, and it is the statutory duty of the carrier not to alter rates of pay, rules, or working conditions, i.e., to maintain the status quo, until the Mediation Board has acted upon the dispute. § 6, 44 Stat. 582 (1926), as amended, 45 U.S.C.A. § 156; see

Burke v. Morphy, 109 F.2d 572 (2 Cir.), cert. denied, 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940). Grand International Bhd. of Locomotive Engineers v. Morphy, 109 F.2d 576 (2 Cir.), cert. denied, 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940). However, the Act does not create any tribunal having final authority to decide a major dispute without the consent of both parties, and in such disputes no provision in the Railway Labor Act prohibits the workers from striking as soon as all of the procedures for settling the dispute have been exhausted without a mutually satisfactory solution having been reached.[6]

The procedure under the 1926 Act for handling the other type of dispute (the minor dispute) soon proved ineffectual to produce peace in the railroad industry. Deadlock often resulted from the refusal by one side or the other to participate in the voluntary local boards which the Act contemplated as the source of decision in such disputes. Moreover, in many cases in which boards were established no decision could be reached because of the equal number of labor and management members on each board. These circumstances produced an ever-increasing backlog of unresolved disputes. See Hearings on S. 3266 before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 17,

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[6] Since the Railway Labor Act contains no provison to the contrary, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, operates to prevent the federal courts from enjoining strikes in major disputes, at least after the exhaustion of all of the procedures provided by the Railway Labor Act for settling such disputes. See Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, n. 24, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944); Order of R.R. Telegraphers v. Chicago & N. W. R.R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960).

137 (1934). To eliminate these roadblocks, the statute was amended in 1934 and the National Railroad Adjustment Board was created, making it unnecessary for the parties to set up local boards. § 3, 48 Stat. 1189 (1934), 45 U.S.C.A. § 153; H.R.Rep. No. 1944, 73d Cong., 2d Sess. 3; S.Rep. No. 1065, 73d Cong., 2d Sess. 1, 2 (1934). Under this amendment, if the parties fail to agree in conference, either side may submit the matter to the National Railroad Adjustment Board. Procedures are provided for assuring that the Board will not become deadlocked, and unless the Board's decision contains a monetary award the decision of the Board is final and binding on the parties. § 3 subd. 1(i) (*l*) (m) (n), 48 Stat. 1189 (1934), 45 U.S.C.A. § 153 subd. 1(i) (*l*) (m) (n), see Union Pac. R. R. v. Price, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959). See generally Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567 (1937). Thus a system of compulsory arbitration of minor disputes was created by the 1934 amendment. Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); California v. Taylor, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957). See Hearings on H.R. 7650 before House Committee on Interstate Commerce, 73d Cong., 2d Sess. 47, 58, 60, 81-82, 118 (1934); Hearings on S. 3266 before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 33, 35 (1934). To effectuate these procedures for the conclusive determination of minor disputes, courts have issued injunctions against strikes by the railroad unions. E. g., Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra; In the Matter of Hudson & M. R. R., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir.,

1959), cert. denied, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960).[7]

The defendants contend that the present controversy is a major dispute under the Railway Labor Act; and, therefore, their strike may not be enjoined, or, at least, may only be enjoined for the short period of time necessary for the exhaustion of mediation and the other major dispute procedures. The railroad, on the other hand, claims that this is a minor dispute; and, therefore, the strike must be enjoined so that the issue between the parties can be decided with finality by the Railroad Adjustment Board. We are called upon to decide whether this dispute is a major or a minor dispute, so that the parties then may go forward under the applicable set of procedures sanctioned by the Railway Labor Act. As Elgin, J. & E. Ry. v. Burley, supra, explained, the difference between major and minor disputes is that the former relate to new agreements or changes in existing contracts whereas the latter involve the interpretation and the application of existing agreements. We readily recognize that here, as in other areas of jurisprudence, the difference, on the one hand, between the interpretation and the application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree.

In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the

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[7] There is some doubt whether a federal court has power to issue an anti-strike injunction in a minor dispute before the matter is submitted to the Railroad Adjustment Board. Cf. Manion v. Kansas City Terminal Ry., 353 U.S. 927, 77 S.Ct. 706, 1 L.Ed.2d 722 (1957); Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). But inasmuch as the Rutland Railway has submitted the present controversy to the Board, we are not here faced with this problem.

maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute. Compare Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in reality does not relate to that dispute. See Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 394-397 (1960).

But, on the other hand, we should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties. If this is a minor dispute, a decision on the merits of the dispute is the function of the National Railroad Adjustment Board; and if this is a major dispute the outcome of the parties' difference is to be determined by extra-judicial forces and procedures. See Order of Ry. Conductors v. Pitney, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed.318 (1946); Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, 248 F.2d 34 (4 Cir., 1957), cert. denied, 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958).

The disagreement between the Rutland Railway and its employees is not whether the train runs on the Ogdensburg Subdivision should be rescheduled, but, instead, whether the railroad has the unilateral right to make those changes without negotiating about them with the brother-

hoods. Cf. Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, supra; Missouri-K.-T. R. R. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir., 1959), reversed on other grounds, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960). Whether it be a major or a minor dispute, the disagreement is a dispute over the scope of the railroad's managerial prerogative. It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

The unions assert that the Section 6 notices of November 2, 1959, demonstrate that this is a major dispute. These notices were issued pursuant to national handling and similar notices were issued by most of the other Class I railroads in the country on the same day. Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). Conferences over the changes referred to in those 1959 notices were still going on when the Rutland bulletined the new schedules for the Ogdensburg Subdivision in September 1960.

However, we note that the language in the Rutland's notices was not necessarily inconsistent with the railroad's present contention that it has the right under its existing agreements to change train schedules without negotiation. The November 2, 1959 notices set out a procedure for establishing new runs "which the carrier does not now have the right to establish without agreement with its employees * * *" The notices also state:

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

The Seventh Circuit, faced with the same notices in Hilbert v. Pennsylvania R. R., supra, held that the railroad's November 2, 1959, Section 6 notices involved in that case did not turn a subsequent controversy over a proposed change in certain home terminals of the road into a major dispute. Cf. Pennsylvania R. R. v. Local 2013 of United R. R. Workers, 178 F.Supp. 53 (E.D.Pa.1959). We believe a similar situation exists in the case before us. The Section 6 notices created a major dispute, but the dispute so created was not the dispute over which the Rutland's employees went out on strike ten and one-half months later. Although there is an apparent similarity between the changes proposed in the notice given by the Rutland on November 2, 1959, and the schedule changes which the railroad later made unilaterally, the court below found that the railroad in making the September 1960 changes was not acting pursuant to the earlier notices. We cannot say that the district court was in error in so finding.

Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959), relied upon by the defendants, is distinguishable from the present case. In that case the railroad issued Section 6 notices in which it first proposed to allocate certain ore loading formerly done by yard crews to main line crews, and, failing to reach agreement with the representatives of its workers thereon, it then proposed to reduce the size of the yard crews from five men to three men. Since this second proposal, too, was unacceptable, the railroad announced that the shipper would load its own ore. The shipper was Anaconda Copper Company, which con-

veniently happened to own all of the stock of the railroad. The railroad asserted that since the shipper, instead of the carrier, was going to load the ore, the road's dispute with its employees was at an end, and therefore the strike in which its employees were engaged should be enjoined. The court held that the major dispute commenced by the railroad's Section 6 notices continued, for the action taken by the copper company should be imputed to its wholly-owned subsidiary, the railroad. Thus the court there held that the Section 6 notices related to the controversy throughout. That decision turned upon the specific facts in that case relating to the notices and the dispute. Similarly, in the present case, the significance of the Section 6 notices rests to a large extent on what the Rutland Railway intended when it issued the 1959 Secton 6 notices and what the management and the employees intended when they subsequently became involved in the 1960 dispute. In the present case, upon a set of facts different from those in Butte, A. & Pac. Ry., we have concluded that the controversy created by the Rutland's Section 6 notices was not the same controversy over which its employees struck in September 1960.

The Rutland Railway points out several provisions in its agreements with the defendant brotherhoods which, the railroad contends, demonstrate that it had the right to act as it did. One such provision is Article 39(a) of its agreement with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen:

> "(a) All vacant or new runs will be posted on the division on which they occur within five (5) days, to close within five (5) days, and to be assigned to the oldest bidder within ten (10) days, merit, fitness and ability to be considered. In case of men being away when run is advertised, when reporting for duty their claims to the run will be considered if a junior man has been assigned, if such claim, in writing, is made within five (5) days."

The language of Article XXXVII(a) in the carrier's agreement with the Brotherhood of Locomotive Engineers, and that of Article 39(a) in the agreement with the Brotherhood of Locomotive Firemen and Enginemen, is essentially the same as in the article quoted above. Also Article 39(e) in the agreement with the Conductors and Trainmen states:

> "(e) When established runs are changed to operate out of different terminals, schedules changed two (2) hours or more, twenty (20) miles or more, or the layover of such runs changed, they will be considered new runs and bulletined as such."

The railroad also calls our attention to Articles 16 and 31 of its agreement with the Conductors and Trainmen, Articles 17 and 51 of the Brotherhood of Locomotive Firemen and Enginemen agreement, and Article XVII in the agreement with the Engineers. None of these provisions by themselves alone bestow upon the railroad the right unilaterally to change train runs and home terminals. But they are some indication that each agreement, taken as a whole, implicitly recognizes such a right in the carrier. As we said earlier in the opinion, the present controversy is over the extent of the railroad's managerial prerogative. The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreements. See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv.L.Rev. 389, 401 (1950); Gunther v. San Diego & Ariz. E. Ry., 198 F.Supp. 402, 408-11 (S.D.Cal.1961).

The court below found that in general there had been no negotiation in the past between the Rutland and its employees over changes in train runs. This finding was not clearly erroneous. Across the nation there seems to be no uniform pattern in this matter; some railroads have more

latitude to act unilaterally over changes of this sort than do others. See the Presidential Railroad Commission Report (Feb. 28, 1962) at 295.

In a number of cases involving disagreements similar to the one in the present case, courts have classified the disputes as minor. In the Matter of Hudson & M. R. R., 172 F.Supp. 329 (S.D.N.Y.), aff'd sub nom Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen, 267 F.2d 941 (2 Cir., 1959), cert. denied Hatler v. Dawson, 361 U.S. 928, 80 S.Ct. 385, 4 L.Ed.2d 351 (1960), see also cert. denied, 363 U.S. 843, 80 S.Ct. 122, 4 L.Ed.2d 104 (revision of runs and use of multiple control cars reducing trainmen jobs); Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, 248 F.2d 34 (4 Cir., 1957), cert. denied 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958) (change of point for reporting to work); Missouri-K.-T. R. R. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir., 1959), reversed on other grounds, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) (changes in intradivisional runs and away-from-home terminals); Hilbert v. Pennsylvania R. R., 290 F.2d 881 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1960) (reassignment of engineers from one terminal to another); Baltimore & O. R. R. v. United R. R. Workers, 271 F.2d 87 (2 Cir., 1959), vacated and remanded on other grounds, 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960) (abolition of post of oiler on diesel powered tugs).

In the light of the provisions of the collective bargaining agreements, the prior conduct of the parties as found by the trial judge and the decisions in analogous cases, we hold that the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960; therefore, we hold that the ensuing dispute must be viewed by the courts as a minor dispute. Whether the railroad does in fact have the rights

it claims, or whether on further analysis it does not is for the Board to determine; on the *ultimate* resolution of this issue we express no opinion. We only hold that for the purpose of defining the extent to which a court may intervene and enjoin a strike the dispute in the present case is to be considered minor as one involving the interpretation of existing agreements.

Our decision is not inconsistent with the Supreme Court's holding in Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). Besides concluding in that case that a controversy over a railroad's proposal to reduce the number of its stations was a labor dispute under the Norris-LaGuardia Act, the Court held that that disagreement between management and labor involved a bargainable issue and that the controversy was a major dispute. We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain over future procedures for changing train runs and schedules. We only hold that there is a sufficient indication that the existing agreements have preserved management's right unilaterally to make the schedule changes management intended to make so as to require that the dispute be submitted to the National Railroad Adjustment Board, as provided by the Railway Labor Act.

We are not entirely certain what constituted the basis in the Chicago & N. W. R. R. case for the Court's other conclusion that there a major dispute existed. Cf. Hilbert v. Pennsylvania R. R., 290 F.2d 881, 895 (7 Cir.), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961). Probably the Court was applying the traditional standards for distinguishing the two types of disputes, and, on the facts presented to it in that case, concluded that a major dispute was present. On a different set of facts we have

found a minor dispute here. But perhaps the Court in Chicago & N. W. R. R. was adding a new dimension to the usual criteria for distinguishing major disputes from minor ones, that of the magnitude of the effect on working conditions which would result from the proposal by the railroad. But even if the Court was adding this ingredient to its analysis, which we doubt, the controversy before us is still a minor dispute because the proposed schedule changes on the Ogdensburg Subdivision would only affect very few jobs.

The court below did not condition its issuance of the injunction against appellants on a requirement that the railroad maintain the *status quo*. It was certainly within the court's power to impose such a condition. See Brotherhood of Locomotive Engineers v. Missouri-K.-T. R. R., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960); also United R. R. Workers, etc. v. Baltimore & O. R. R., 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960). But likewise it was in the court's discretion to decline to impose conditions. 363 U.S. at 534-535, 80 S.Ct. 1326, 4 L.Ed.2d 1379. We find no abuse by the court of its discretionary powers in this area.

Interrelation of the Railway Labor Act and the Norris-La Guardia Act

In general, the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115, passed in 1932, deprives federal district courts of jurisdiction to issue injunctions against strikes by employees in labor disputes, § 4(a), 47 Stat. 71 (1932), 29 U.S.C.A. § 104(a); allows injunctions to be granted against unlawful acts which will cause irreparable injury only under strict procedural requirements, § 7, 47 Stat. 71 (1932), 29 U.S.C.A. § 107; and precludes injunctive relief even when these stringent requirements are met if the complainant has failed to fulfill, on its part, its legal obligations or has failed, on its part, to make rea-

sonable attempts to settle the labor dispute by negotiation, mediation, or voluntary arbitration, § 8, 47 Stat. 72 (1932), 29 U.S.C.A. § 108. See 75 Cong. Rec. 4626, 4629 (1932); Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61 (2 Cir., 1961), certiorari denied 370 U.S. 936, 82 S.Ct. 1578, 8 L.Ed.2d 806. This statute embodies a policy of fostering the resolution of labor difficulties through the interplay of private forces unhampered by judicial interference. See S.Rep. No. 163, 72d Cong., 1st Sess. 18 (1932); H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932). The draftsmen of the Norris-LaGuardia Act had before them the 1926 provisions of the Railway Labor Act, which included most of the present procedures for settling major disputes, the provisions for disposing of minor disputes through voluntary local boards, and Section 2 First and Second, 44 Stat. 577 (1926), 45 U.S.C.A. § 152 First and Second, which imposed on both management and labor the duty to confer over any dispute. All of these provisions channeled, but did not eliminate, the operation of private forces in the determination of labor disputes. See Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 58-59, 64 S.Ct. 413, 88 L.Ed. 534 (1944); cf. 75 Cong. Rec. 4505-10, 4618-26, 5462-515 (1932). Subsequent labor legislation, however, including the 1934 amendments to the Railway Labor Act which provided for official adjudication of certain labor disputes by the National Railroad Adjustment Board, reflected a policy of interpositioning greater governmental participation in labor relations. See Note, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv.L.Rev. 354, 356 (1958). To accommodate the differing policies underlying the Norris-LaGuardia Act and the Railway Labor Act is not an easy task. In Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), the Supreme Court stated:

> "* * * the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

On numerous occasions courts have issued injunctions in labor disputes despite the apparently categorical language of the Norris-LaGuardia Act. In Virginian Ry. v. System Fed'n 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937), a labor union which had been certified by the National Mediation Board obtained an injunction against a railroad commanding the road to deal with it and not to interfere with the employees' choice of a bargaining representative. In a series of cases the Supreme Court has held that railroad unions may be enjoined from showing discrimination in their representation of railroad employees. Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949); Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). See also Steele v. Louisville & N. R. R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) (arising in a state court where Norris-LaGuardia Act was inapplicable). See also Railroad Yardmasters of America v. Pennsylvania R. R., 224 F.2d 226 (3 Cir., 1953). See, generally, Chicago, R. I. & Pac. R. R. v. Switchmen's Union, supra; American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777, 785-787 (S.D.N.Y.1958).

In Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), the Supreme Court held that the Norris-LaGuardia Act did not preclude a federal court from enjoining a strike

which might defeat the effectiveness of the National Adjustment Board's authority to adjudicate a minor dispute. The Court concluded first, that Congress had intended the proceeding before the Adjustment Board to be a reasonable substitute for self-help and second, that the earlier and more general language of the Norris-LaGuardia Act should give way to the later specific provisions of the 1934 amendments to the Railway Labor Act. For cases in which lower courts have enjoined strikes in such situations, see supra at p. 2092. In the present case, as in the Chicago River case, a minor dispute is involved, the railroad has submitted the matter to the Railroad Adjustment Board, and we follow the lead provided for us in that case and its progeny. We hold that an injunction is properly issuable in order to enforce compliance with the requirement of the Railway Labor Act that a minor dispute is to be heard and determined by the National Railroad Adjustment Board.[8] Cf. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457-459, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

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[8] In 1960 the Supreme Court again spoke on the relationship between the Norris-LaGuardia Act and the Railway Labor Act. Order of R. R. Telegraphers v. Chicago & N. W. R. R., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 744 (1960). The Court held that Section 4 of the Norris-LaGuardia Act withdrew jurisdiction from the federal court to enjoin the strike involved in that case. The Court discovered no provision of the Railway Labor Act which made the strike unlawful and concluded that there the dispute was a major one. That case is distinguishable from the present one for the labor dispute here is a minor dispute. The Supreme Court in Chicago & N. W. R. R., though holding that the strike there could not be enjoined, recognized that federal courts could enjoin strikes arising out of minor disputes. 362 U.S. at 341, 80 S.Ct. 761. Moreover, a strike which would frustrate the procedures created by the Railway Labor Act for the final determination of such disputes would be unlawful. Cf. Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61 (2 Cir. 1961), certiorari denied 370 U.S. 936, 82 S.Ct. 1578, 8 L.Ed.2d 806.

But what significance for the case before us have Section 2 First, Second, and Sixth of the Railway Labor Act and Section 8 of the Norris-LaGuardia Act? Section 2 First and Second impose a duty on both parties to make every reasonable effort to settle a dispute, whether it be major or minor, and, as a part of their efforts, to confer over their differences.[9] Section 2 Sixth provides the procedure for calling a conference to discuss a minor dispute. These conferences are to take place before a submission of the dispute to the Railroad Adjustment Board. § 3 First (i), 48 Stat. 1189 (1934), 45 U.S.C.A. § 3 First (i); Elgin J. & E. Ry. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945); Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra at 33. The present Section 2 First, Second and Sixth were already part of the Railway Labor Act when the Norris-LaGuardia Act was passed. See Railway Labor Act § 2 First, Second, Fourth, 44 Stat. 577 (1926).

Section 8 of the Norris-LaGuardia Act states:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available

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[9] These sections provide in pertinent part:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort * * * to settle all disputes, whether arising out of the application of such agreements or otherwise, * * *.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, and in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

governmental machinery of mediation or voluntary arbitration."

Section 8 thus imposes two different requirements on one who seeks injunctive relief in a labor dispute. He must comply with all his legal obligations relevant to the dispute and, further, he must make every reasonable effort to settle the dispute by the methods enumerated. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed.534 (1944). This is known as the "clean hands" provision of the Norris-LaGuardia Act. See 75 Cong.Rec. 5464 (1932).[10]

Since section 2 First, Second and Sixth of the Railway Labor Act were enacted before the Norris-LaGuardia Act, the rule of thumb upon which courts too often rely that the scope of earlier and more general legislation must always be reconsidered in the light of more specific provisions appearing in subsequent legislation does not help in deciding the present question. Moreover, the purpose of the Railway Labor Act, § 2 First, Second and Sixth and the purpose of the "clean hands" provision of the anti-injunction statute are not so inconsistent that it is impossible to accommodate one to the other.

In Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., supra, the Supreme Court held that under section 8 of the Norris-LaGuardia Act a railroad was not entitled to an injunction against a strike because the road had refused to submit to voluntary arbitration, an available

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[10] The extent to which the Supreme Court has gone to enforce compliance with this provision of the Norris-LaGuardia Act is seen in Brotherhod of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944), in which the Court reversed an order granting injunctive relief to a complainant that had not complied with section 8, and this despite the fact that the acts complained of had caused violence.

method for settling the dispute there involved. In Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959) (alternative holding) the Court of Appeals for the Ninth Circuit held that an anti-strike injunction had to be denied under the Norris-LaGuardia Act because the railroad had abandoned the procedures of the Railway Labor Act for settling the major dispute in that case. Although both of these cases involved major disputes, we believe their treatment of the relationship between section 8 of the Norris-LaGuardia Act and the procedures set up by the Railway Labor Act for settling railway labor disputes is applicable to the case before us. See Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen, supra, at n. 10. Cf. East Texas Motor Freight Lines v. International Bhd. of Teamsters, 163 F.2d 10 (5 Cir., 1947).[11]

Reading the relevant sections of the Railway Labor Act together with the "clean-hands" provision of the Norris-LaGuardia Act, and remembering that the dispute here is a minor dispute, we observe that an applicant for an injunction (1) must comply with all legal obligations required of it including the making of every reasonable effort to settle the dispute by conference and (2) must make every reasonable effort to settle the dispute by nego-

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[11] In Chicago, R. I. & Pac. R. R. v. Switchmen's Union, 292 F.2d 61, 66 (2 Cir. 1961), certiorari denied 370 U.S. 936, 82 S. Ct. 1578, 8 L.Ed.2d 806, it was suggested that a union which failed to comply with the Railway Labor Act, § 2 First, Second might be subject to an anti-strike injunction. The present case involves the converse situation. The railroad, perhaps, has failed to comply with those provisions, and, therefore, under § 8 of the Norris-LaGuardia Act, if its failure is shown, it may be deprived of injunctive relief as long as it continues in its dereliction. See also Long Island R. R. v. Brotherhood of R. R. Trainmen, 185 F.Supp. 356 (E.D.N.Y. 1960).

tiation.[12] We are not certain whether the draftsmen intended different concepts by the words "conference" and "negotiation." See Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., supra, 321 U.S. at 61, 64 S.Ct. 413, 88 L.Ed. 534. However, we find that in applying these terms to the present controversy a distinction should be drawn between the duty to negotiate and the duty to confer. We construe "negotiation" to mean full-scale discussion and disputation. We construe "conferring" to mean activity of a similar type to negotiation but activity requiring a lesser output of time and of energy. We must make this distinction in the present case because of the nature of the issue which divides the parties. The basic dispute is whether the railroad under its existing agreement must *negotiate* before it reschedules the runs on the Ogdensburg Subdivision. If the railroad were required by statute to negotiate this issue before it submitted the dispute to the Adjustment Board, the result would be to require the railroad to negotiate with employee representatives over whether it should negotiate with them—a solution sounding a lot like an exercise in theoretical logic. We think in practice it would be virtually impossible for the parties to negotiate whether they would negotiate about the rescheduling without actually negotiating about the rescheduling itself. Thus the brotherhoods would immediately achieve what they are only entitled to obtain after adjudication of the dispute by the Railroad Adjustment Board. Therefore, we hold that any requirement in section 8 of the Norris-LaGuardia Act that a railroad negotiate before obtaining an injunction is superseded by the statutory scheme in the Railway Labor Act that gives the Adjustment Board the power to decide whether there should be any negotiation at all between management and the brotherhoods.

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[12] Mediation and voluntary arbitration are only relevant for major disputes.

But in minor disputes involving the scope of the managerial prerogative it must be that Section 2 First, Second and Sixth of the Railway Labor Act together with the Norris-LaGuardia Act impose some lesser duty on a railroad which seeks injunctive relief. Otherwise, in any minor dispute in which a railroad can contend that the question is one committed to managerial prerogative, the railroad will be tempted not to try to reach a private understanding with the representatives of its employees, a result inconsistent with one of the fundamental policies of the Railway Labor Act. See Brotherhood of R. R. Trainmen v. Toledo, P. & W. supra; Gunther v. San Diego & Ariz. E. Ry., 198 F.Supp. 402 (S.D.Cal.1961). Therefore, we hold that the relevant sections of the Railway Labor Act and the Norris-LaGuardia Act impose a duty upon a railroad, short of negotiation, to take some reasonable steps toward dispute settlement before it can obtain an anti-strike injunction. These lesser efforts are comprehended within the concept of "conferring." It is not easy to state exactly what the railroad must do in cases in which it must confer but need not negotiate. In each case the district judge must apply his experience and good sense to the specific circumstances of the case. However, certain minimum steps can be suggested for the usual case. Unfair surprise should be avoided whenever possible. The representatives of management should meet with those of labor. Each side should listen to the contentions of the other side and each side should explain its position clearly and honestly, but not for as long a time as is customary in full-scale bargaining. In short, men of good faith must in good faith get together in a sincere effort to resolve their differences. Cf. Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., at n. 18; Brotherhood of Ry., etc. Clerks v. Atlantic Coast L. R. R., 201 F.2d 36, 40 (4 Cir.), cert. denied, 345 U.S. 992, 73 S.Ct. 1131, 97 L.Ed. 1400

(1953); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F.Supp. 777 (S.D.N.Y. 1958); Long Island R. R. v. Brotherhood of R. R. Trainmen, 185 F.Supp. 356 (E.D.N.Y. 1960). See also N. L. R. B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958); N. L. R. B. v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956); N. L. R. B. v. Insurance Agents' International Union, 361 U.S. 477, 80 S.Ct. 419 L.Ed.2d 454 (1960).

In the present case the district court made no finding whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief. The telegram that the railroad sent to the brotherhoods on September 15 stated "Conferences on this issue have not been held on the property with the [brotherhoods]." However, the railroad claimed at the hearing that its representatives met with representatives of the brotherhoods on September 9 and on September 16. We cannot determine from the record alone, without the benefit of observing the witnesses, whether the extent of these discussions met the standard we find is imposed by the Railway Labor Act.

If in fact the railroad has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees. Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir.), cert. denied, 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959). Therefore, we must remand the case for the district court to determine whether the railroad made reasonable efforts to settle this dispute in conference. See Pennsylvania R. R. v. Transport Workers Union, 178 F.Supp. 30 (E.D.Pa.1957) (Finding No. 15), appeal dismissed, 3 Cir., 278 F.2d 693 (1960). If

the district court finds that the railroad has not done so, it should not issue the injunction until the railroad has perfected its right to such relief by compliance with its statutory obligation.

We believe that this disposition accommodates the purposes of both statutes. Except for the creation of the Railroad Adjustment Board, the policy behind both statutes is to facilitate the private settlement of labor disputes, see Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., 321 U.S. 50, 58, 64 S.Ct. 413, 88 L.Ed. 534 (1944); Dwellington v. Thompson, 91 F.Supp. 787 (D.Mo.1950), aff'd sub nom. Rolfes v. Dwellington, 8 Cir., 198 F.2d 591 (1952). Furthermore, it cannot be said that this result subverts the jurisdiction of the National Railroad Adjustment Board because efforts privately to settle a dispute are required by the Railway Labor Act itself before submission of the dispute to the Adjustment Board.

Our decision is consistent with the Supreme Court's ruling in Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., supra. In that opinion, especially at footnote 24, the Court concluded that because the Railway Labor Act created the Railroad Adjustment Board to decide the merits of minor disputes with finality, Section 8, like the other provisions of the Norris-LaGuardia Act, did not bar injunctive relief. But the Court did not address itself to the relationship of section 8 to those provisions of the Railway Labor Act which, without regard to the type of dispute involved call for private conference in an effort to adjust the differences between the parties prior to governmental intervention. Therefore, that decision is not relevant to this part of our opinion. See discussion in Chicago R. I. & Pac. R. R. v. Switchmen's Union, supra.

at 66, as to the scope of the decision in the Chicago River & Ind. R. R. case.[13]

Reversed and remanded for further proceedings not inconsistent with this opinion.

MARSHALL, Circuit Judge (dissenting).

With deference to my brothers, I deem the issues raised by the present case to be of such importance that a statement of my dissenting views is necessary. Because the "Section 6" and contract termination notices served by Rutland were also issued by most of the Class I railroads in the country, the factual pattern before us is of national importance. Much of what the majority says seems to me not only well put but also quite correct. I do not disagree with their treatment of the venue problem, with most of their general statements as to when a strike is legal or illegal under the Railway Labor Act, or with the assertion that a "labor dispute" is involved in this case. I strongly disagree, however, with the result they reach and would suggest that much of what they say is actually inconsistent with that result.

The majority correctly states the principal issue to be whether the dispute between the parties was "major" or "minor" under the Railway Labor Act. That proposition, however, is of such generality that it fails to pose the problems we must solve in any meaningful fashion. The legal dispute here involves two questions. First, what procedures must a party to a collective agreement in the railroad in-

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[13] The defendants also assert that the railroad is not entitled to an injunction because it has not complied with the non-statutory duty of clean hands imposed on all who seek to invoke the jurisdiction of a court of equity. We believe that in the present case the scope of this non-statutory obligation is no greater than the statutory obligation imposed by Section 8 of the Norris-LaGuardia Act.

dustry follow in order to terminate that agreement or any part thereof?[1] Second, the termination having been accomplished, under what circumstances may the parties resort to economic force?

My position, briefly summarized, is that Rutland voluntarily terminated so much of the collective agreement as might be said to govern the establishment of new runs and the merging or elimination of crew terminals and, then, believing that it could not secure what it desired through the normal processes of collective bargaining, violated the plain mandates of the Railroad Labor Act's major dispute procedures by unilaterally changing certain runs and terminals. This action should have been enjoined by the District Court. It does not follow that a strike to prevent such changes was justifiable, however, since, in my view at least, a remedy in the courts was available to the union and should have been resorted to. I would, therefore, have enjoined both Rutland and the Brotherhoods from engaging in self-help until exhaustion of the major dispute procedures.

The majority's conclusion is radically different. They hold explicitly that the agreement insofar as it dealt with the establishment of runs and terminals was not terminated and *sub silentio* that there was in fact no way in which to terminate it. They enjoin the union's use of economic force, therefore, pending exhaustion of the drawn-out minor dispute procedures and leave Rutland free to act unilaterally.

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[1] This seems to me to be the principal issue in the case since I would agree that if the revelant contractual provisions had not been terminated, the decision would be clearly governed by Brotherhood of R. Trainmen v. Chicago R. & I. Ry., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957).

The words "major" and "minor" have no intrinsic legal significance. They are derived from the terminology of railway industrial relations and are used judicially merely as a shorthand way of referring to a distinction incorporated in the structure of the Railway Labor Act. The statute, itself, however, does not use the words. The distinction is of legal significance solely because the Act establishes mutually exclusive mandatory procedures to be followed in resolving two different kinds of disputes.

Disputes involving grievances or contract interpretation questions are to be handled under Section 3 First.[2] Under that provision either party may submit the dispute to the appropriate Adjustment Board for a "final and binding" decision on the meaning of the contract. A strike over disputes properly submitted to the Adjustment Board may be enjoined in order to protect the Board's jurisdiction. Brotherhood of R. Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). And, in appropriate circumstances, the enjoining court may condition the strike injunction upon preservation of the *status quo* by management pending final adjudication by the Board. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1435 (1960).[3]

But labor contracts in the railroad industry do not continue in force *in perpetuum* unless both parties so desire. Like many familiar agreements, they are subject to termi-

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[2] 45 U.S.C.A. § 153 First.

[3] Even though the majority believes a minor dispute is involved, it does not discuss the applicability of that decision to this case. Since I cannot agree this is a minor dispute, I shall also forgo discussion.

nation and change, a process which, when invoked by a party,[4] is characterized as a major dispute.

While the Act provides for compulsory arbitration of minor disputes, it leaves the resolution of major disputes to free collective bargaining and the use of economic force subject only to certain mandatory procedural requirements. Section 6[5] governs the procedure to be followed in changing agreements affecting working conditions. Any party desiring such a change must give 30 days written notice to the other party. Either party may then request the services of the Mediation Board or the Board may step in on its accord under Section 5.[6] Under Section 6 "rates of pay, rules, or working conditions shall not be altered" until final action by the Mediation Board under Section 5. Section 5 prohibits changes in "rates of pay, rules, or working conditions or established practices" until 30 days after the Board has notified the parties of the failure of its mediatory efforts. Section 10[7] empowers the President to establish an emergency board after the failure of mediation efforts and provides "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" until thirty days after the Board makes its report to the President. The legislative history indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute pro-

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[4] Presumably, a palpable breach of contract would be in violation of Section 6, see note 5, infra, and accompanying text, which requires 30 days written notice of an intended change in agreements and would therefore also create a major dispute. Cf. Railroad Yardmasters of America v. Pennsylvania R. Co., 224 F.2d 226 (3 Cir. 1955).

[5] 45 U.S.C.A. § 156.

[6] 45 U.S.C.A. § 155.

[7] 45 U.S.C.A. § 160.

cedures in exchange for a statutory provision restraining management from disturbing the *status quo*.[8] These "freeze"[9] or "cooling-off"[10] provisions have been held to be enforceable by the courts. Grand International Brotherhood, etc. v. Morphy, 109 F.2d 576 (2 Cir., 1940); cert. denied 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940); Railroad Yardmasters v. Pennsylvania R. Co., 224 F.2d 226 (3 Cir., 1955).

No provision is made, however, for the compulsory resolution of substantive issues in major disputes, and the parties are free to resort to economic force after exhausting the procedures. Chicago River, supra, at fn. 24; Order of R. Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d774 (1960). See also Chicago, Rock Island and Pac. R. Co. v. Switchmen's Union, 292 F.2d 61 (2 Cir., 1961).

Within this legal framework, I fail to grasp how the factual pattern here presents the difficulties encountered by the majority. On November 2, 1959, Rutland served notice on the Brotherhoods "under our existing agreements and pursuant to the provisions of the Railway Labor Act" that it wanted a new contract, "effective January 1, 1960," which would in effect eliminate all "agreements, rules, regulations, interpretations and practices, however established," restricting the carrier's right to establish new runs and which would also explicitly "[e]stablish a rule to provide that * * * [t]he carrier shall have the right to establish, move, consolidate and abolish crew terminals * * * with the right to operate

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[8] 67 Cong.Rec. 4524, 4588. See also comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 388 (1960).

[9] Chicago, Rock Island & Pac. R. Co. v. Switchmen's Union, 292 F.2d 61, 66 (2 Cir. 1961).

[10] 67 Cong.Rec. 4648, 4650.

any * * * run * * * through established crew terminals." This was a 30 day notice of termination of all contractual provisions, explicit or implied, relating to the establishment of new runs and crew terminals. Rutland, by thus invoking Section 6 of the Act, and the termination provisions of the contracts, notified the Brotherhoods that it desired not only to terminate all restrictive provisions, practices and even all ambiguities as to the establishment of new runs but also that it wanted an explicit provision incorporated in a new agreement which would bestow upon it the absolute prerogative to change crew terminals. Rutland thereby voluntarily terminated the old agreement to this extent and invoked the major dispute procedures. Having invoked them, presumably it was bound by them.

Nevertheless, on September 8, 1960, before exhaustion of the major dispute procedures, Rutland announced that it intended unilaterally to establish new runs thereby changing certain crew terminals and to operate these runs through other established terminals. Since the major dispute procedures require that the carrier not change "working conditions," "established practices," or the "conditions out of which the dispute arose" until their exhaustion, Rutland's action was a plain violation of the Railway Labor Act.[11]

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[11] Arguably, these provisions might be read merely to mean that the collective agreement, with all its ambiguities, is to remain in force pending exhaustion of the major dispute procedures. Under that view, minor disputes could occur during that period and might involve the subject matter of the major dispute. In such a case, however, the union would still be free to strike over the issue after exhaustion of the major dispute procedures. A contrary holding would mean that ambiguous terms in a collective agreement would not be subject to change through collective bargaining until their meaning had been determined by the Adjustment Board. This would effectively lengthen the term of the contract beyond the intentions of the parties and would prohibit clarification through

The Brotherhoods called a strike because of the unilateral changes announced by Rutland and were enjoined by the District Court.

In reviewing that action, I should have thought the principal question would be whether the union was free to strike against Rutland's illegal actions or whether the conduct of both parties in derogation of the major dispute procedures must be enjoined. On balance, I would have adopted the latter course both on the grounds that resort to the courts is generally preferable to this kind of self help[12] and on the further grounds that the "cooling off" policies of the major

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collective bargaining of those contractual provisions which need it most. It would, moreover, seem directly contrary to the intent of Section 6 which contemplates the proposal of changes in agreements whenever the parties desire and which contains no provisions restraining its use until an Adjustment Board decision has been rendered on the meaning of the old contract.

In any case, the preferable view is that changes in existing conditions which are the subject of a major dispute are forbidden whether or not they are arguably authorized by the collective agreement. The "freeze" provisions carefully avoid reference to the collective agreement, but emphasize "working conditions" (Section 6), "established practices" (Section 5), and "conditions out of which the dispute arose" (Section 10). This is in contrast to other parts of the Act, and, indeed, Section 6 itself, which refer directly to the "agreement" when necessary. Moreover, the legislative history of the statute shows the "freeze" provisions were intended to enforce a "cooling off" period upon both labor and management in the railroad industry. See Note 10, supra. But this policy cannot be effectuated if management is allowed to take advantage of an ambiguous contract during the "freeze" to make changes in working conditions relating to the dispute. Such action is far more likely to warm up the dispute than cool it off.

[12] Cf. Bakery Sales Drivers Local 33, v. Wagshal, 333 U.S. 437, 68 S.Ct. 630, 97 L.Ed. 79 (1948); Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248 (1926); but see Mastro Plastics Corp. v. N. L. R. B., 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956).

dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act. These problems have become irrelevant, however, for the majority has concluded that the dispute is minor and must be resolved by an Adjustment Board determination of the meaning of the old agreement.

One reason asserted by the majority in support of this result seems to be that the Section 6 notice was not sufficiently broad to cover the matters in dispute. Two quotations from the notice are set out, apparently only to do away with restrictions on the managerial prerogative to establish new runs. The majority then finds there are no *explicit* restrictions in the agreements, and, therefore, the Section 6 notice does not encompass this dispute. But if all this is true, why did Rutland serve notices pursuant to Section 6 and the various contracts in the first place? Plainly, Rutland's purpose was to eliminate the ambiguities[13] in the agreement which the majority admits exist and in fact relies upon in sending this case to the Adjustment Board. I have not found any language in the statute or policy behind it which would prohibit or nullify this use of Section 6 in the manner suggested by the majority. I believe that clarification through collective bargaining of ambiguous contractual provisions is a most laudable purpose and should be encouraged rather than hampered by the courts. Moreover, the majority inexplicably ignores paragraph B(1) of the notice. That paragraph explicitly notifies the unions that Rutland

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[13] Existing ambiguities in a document cannot be cured by the continued silence of the parties. Obviously, therefore, Rutland's notice contemplated insertion of new provisions which would either affirmatively establish its prerogatives or would direct the Adjustment Board to follow a rule of construction which would prevent "interpretations" from infringing on these rights. Either course would require a new provision and a "change" in the existing agreements.

seeks to "Establish a rule to provide that * * * 1. The Carrier shall have the right to establish, move, consolidate and abolish crew terminals * * *". Surely a request to incorporate a comprehensive clause such as this must be said to change an ambiguous contract or an agreement containing no such explicit provision. That paragraph B(1) encompasses the dispute here is plainly evident, for the majority itself states the present "disagreement * * * [is] whether the management of the railroad had the right to * * * change crew terminals."

The majority states the "major-minor" distinction in the following fashion:

> "It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; * * *."

While this might be a correct statement of the law in the absence of a Section 6 notice, I would suggest that it is entirely erroneous once such a notice has been served. The majority opinion itself at one point concedes that major disputes commence with notice under Section 6. Moreover, it must be so, for under the Railway Labor Act a party is free to terminate an ambiguous contract in the hope of making it explicit without going to an Adjustment Board for a determination of its meaning. This is precisely what Rutland attempted to do. The reliance placed by Rutland and the majority upon the collective agreement is utterly inconsistent with the Section 6 notice, for Rutland intended by that notice to terminate and do away with the very same contractual provisions which are now so strenuously relied upon. And, the inconsistency of relying on these

provisions is magnified since the notice was also based upon the termination clauses of the same agreements. I dare say that if this were a commercial contract with a 30 day termination provision, we would not show such solicitude for one who invoked the termination procedures but later claimed the agreement was still in effect when the other party refused to meet his demands for a new contract.

But the significance of today's decision transcends the immediate and hopefully temporary problems of the Rutland Railroad and its employees. There is much in the majority opinion which implies there cannot be a major dispute if the relevant agreement contains an "ambiguous," but "clearly governing", provision, regardless of whether a Section 6 notice has been served. The quotation in the preceding paragraph seems to be to that effect. Along the same lines, reliance is placed upon "a number of cases involving disagreements similar to the one in the present case, [in which] courts have classified the disputes as minor." In all but one, however, there was no effective Section 6 notice and, therefore, no effective termination of the agreement.[14] The Railway Labor Act establishes a

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[14] In the Matter of Hudson & M. R. Co., 172 F.Supp. 329 (S.D. N.Y.1959), aff'd per curiam sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. Trainmen, 267 F.2d 941 (2 Cir. 1959) cert. denied 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960) (proposal to amend the agreement withdrawn); Norfolk & P.B.L.R. v. Brotherhood of R. Trainmen, 248 F.2d 34 (4 Cir. 1957) cert. denied 355 U.S. 914, 78 S.Ct. 343, 2 L.Ed.2d 274 (1958) (no section 6 notice); Missouri-Kansas-Texas R. Co. v. Brotherhood of Locomotive Engineers, 266 F.2d 335 (5 Cir. 1959) rev'd on other grounds 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379 (1960) (no section 6 notice); Baltimore & O. R. Co. v. United R. Workers, 271 F.2d 87 (2 Cir. 1959) vacated and remanded on other grounds 364 U.S. 278, 80 S.Ct. 1609, 4 L.Ed.2d 1719 (1960) (no section 6 notice). Of the cases cited by the majority, only Hilbert v. Pennsylvania R. Co., 290 F.2d 881 (7 Cir. 1961) cert. denied 368 U.S. 900, 82 S.Ct.

system of free collective bargaining, Section 6 being an integral part of that system. It is designed to allow either party to terminate an agreement, whether or not its meaning is clear, and bargain freely over new provisions subject only to certain procedural requirements. To hold that Section 6 is rendered inoperative if there is an ambiguous, but clearly governing, provision in the present agreements is to give it an effect precisely opposite to that intended and to deprive the parties of their right to bargain freely.

The dilemma created by the majority opinion is neatly posed when it says, "[T]he brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain" over the issues in dispute. But the only manner in which the existing agreements may "expire" is through notice pursuant to Section 6 by one of the parties, since none of these contracts contains a fixed expiration date.[15] Presumably, if the union had, on November 2, 1959, issued a Section 6 notice stating its desire to "eliminate all agreements, rules, regulations, interpretations and practices, however established, *allowing* the carrier to establish new runs *without the union's consent*," and to "establish a rule that the carrier shall *not* have the right to establish, move, consolidate crew terminals or to oper-

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174, 7 L.Ed.2d 96 (1960) involved a Section 6 notice. I would submit that decision is erroneous.

The majority omits one decision involving a dispute "similar to the one in the present case." Order of R. Telegraphers v. Chicago & N. W. R. Co., 363 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). A Section 6 notice *was* involved in that case, and the Supreme Court found it to be a major dispute. See Note 18, infra, and accompanying text.

[15] Each contract provided that it was to remain in effect until changed in accordance with the Railway Labor Act. The thrust of the majority's decision, therefore, is to eliminate the possibility of termination and to restrict the freedom of the parties to bargain collectively.

ate any runs through established crew terminals, *without the union's consent*" the majority's ruling would not vary.[16] Yet that is not significantly different from Order of R. Telegraphers v. Chicago & N. W. R. Co., 363 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960), in which the Supreme Court held that a major dispute existed. While the majority is "not entirely certain" as to the basis of that decision, I would submit the governing consideration must have been the Section 6 notice.[17] Otherwise, the case would have been indistinguishable from the Court's decision in Chicago River, supra, and all the other cases which have followed it. E. g. cases cited in note 14, supra. The most profitable inquiry for the majority is not how to distinguish Chicago and N. W. Ry. from this case but how to distinguish it from all the cases finding minor disputes. Viewed from that perspective, the "uncertainty" vanishes. In any case, Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9 Cir. 1959), cert. denied, 361 U.S.

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[16] Since there is no explicit grant to the carrier of these rights and there is an ambiguous, but clearly governing, provision, the majority's criteria for determining that a minor dispute exists would be satisfied. Surely the fact that the carrier gave the notice here does not serve to distinguish the two cases. That factor, if anything, would help the brotherhoods.

[17] The majority is correct in stating that the magnitude of the effect upon working conditions is not the governing factor. The statute itself does not use the words major and minor and, therefore, provides no standards for judging the magnitude. Adoption of such a test would engulf us in sterile inquiries such as when does a little dispute on a big railroad become a big dispute on a little railroad. On the one hand, it might tip the tactical balance by allowing management the protection of the equity arm of the federal courts so long at it bit off a little at a time and did not attempt to get everything in one gulp. On the other hand, a literal application of major and minor might encourage the unions to strike over every dispute simply to show how big it was.

864, 80 S.Ct. 122, 4 L.Ed.2d 104 (1959) is precisely on point and explicitly supports my view of the statute. I do not grasp how it may be disposed of simply by asserting the facts are different.[18] As for Hilbert v. Pennsylvania R. Co., 290 F.2d 881 (7 Cir., 1961), cert. denied, 368 U.S. 900, 82 S.Ct. 174, 7 L.Ed.2d 96 (1961), relied on by the majority, I would decline to follow it since it also seems based on the erroneous notion that Section 6 is inoperative when the existing agreement is ambiguous

My reading of the statute and of subsequent judicial interpretations leads me to believe the majority has adopted a view which does much violence not only to our policies of free collective bargaining but also to traditional notions of freedom of contract. I must, therefore, dissent.

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[18] Butte differs from our ruling in Stichman, note 14 supra, as to the effect of a withdrawal of a Section 6 notice. The notice here, however, was not withdrawn.